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No. 90-1189

In the Supreme Court of the United States

OCTOBER TERM, 1990

TROJAN TECHNOLOGIES, INC., ET AL., PETITIONERS

v.

COMMONWEALTH OF PENNSYLVANIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Pennsylvania Steel Products Procurement Act, Pa. Stat. Ann. tit. 73, §§ 1881 *et seq.* (Purdon Supp. 1990), which requires state and local governmental entities within the Commonwealth of Pennsylvania to contract only with those persons who will use or supply domestically produced steel products for public works projects, violates the Commerce Clause or the Equal Protection Clause.

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This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Pennsylvania Steel Products Procurement Act, Pa. Stat. Ann. tit. 73, §§ 1881 *et seq.* (Purdon Supp. 1990), requires every "public agency" within the Commonwealth of Pennsylvania,[1] which enters

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[1] The Act broadly defines "public agency" to include the following:

(1) the Commonwealth and its departments, boards, commissions and agencies;

(2) counties, cities, boroughs, townships, school districts, and any other governmental unit or district;

(3) the State Pubiic School Building Authority, the State Highway and Bridge Authority, and any other

into a contract "for the construction, reconstruction, alteration, repair, improvement or maintenance of public works," to include a contract provision that "only steel products as herein defined shall be used or supplied in the performance of the contract or any subcontracts thereunder." Pa. Stat. Ann. tit. 73, § 1884(a) (Purdon Supp. 1990). As defined by the Act, the comprehensive term "steel products" includes

> [p]roducts rolled, formed, shaped, drawn, extruded, forged, cast, fabricated or otherwise similarly processed, or processed by a combination of two or more of such operations, *from steel made in the United States* by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process * * *.

Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990) (emphasis added).[2]

2. Petitioner Trojan Technologies, Inc., a Canadian corporation, manufactures equipment used in

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> authority now in existence or hereafter created or organized by the Commonwealth;
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> (4) all municipal or school or other authorities now in existence or hereafter created or organized by any county, city, borough, township or school district or combination thereof; and
>
> (5) any and all other public bodies, authorities, officers, agencies or instrumentalities, whether exercising a governmental or proprietary function.

Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990).

[2] The Act further provides that

> [i]f a product contains both foreign and United States steel, such product shall be determined to be a United States steel product only if at least 75% of the cost of the articles, materials and supplies have been mined, produced or manufactured, as the case may be, in the United States * * *.

Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990).

waste and sewage treatment plants. Petitioner Kappe Associates, Inc., a Maryland corporation, is Trojan's sales representative in the United States. Among other products, Trojan manufactures the "UV-2000" —an ultraviolet light water disinfection system. The UV-2000 has two steel components, the module rack and the module control box. Pet. App. 4a. Sometime before 1988, "[s]everal Pennsylvania municipalities and authorities * * * purchased the UV-2000 and installed it at waste-water and sewage-treatment facilities." *Ibid.* In July 1988, the Attorney General of Pennsylvania notified Trojan that the firm's UV-2000 "is covered by the Steel Procurement Act," C.A. App. 14a, and therefore "request[ed] documentation confirming that its ultraviolet disinfection system complies with the Act," Pet. App. 4a; see C.A. App. 37a.[3]

In response, Trojan and Kappe filed this federal court action in August 1988 against respondents, the Commonwealth of Pennsylvania and the Attorney General of Pennsylvania. Petitioners contended that the Steel Products Procurement Act was unconstitutional on several grounds, and therefore sought an injunction against its enforcement. In particular, petitioners claimed that the Act violated the Commerce Clause, impermissibly trenched on the federal government's exclusive authority over foreign affairs, conflicted with federal law, and was otherwise void for vagueness. Pet. App. 5a, 31a-32a; see C.A. App. 9a-10a (Compl. ¶ 10).

3. On cross-motions for summary judgment, the district court in January 1990 denied petitioners'

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[3] As the court of appeals pointed out, "there has been no final determination that the Act has been violated [by petitioners' sales of the UV-2000 to Pennsylvania municipalities]." Pet. App. 5a.

claims and upheld the constitutionality of the Pennsylvania Steel Products Procurement Act. Pet. App. 30a-40a.[4] The court rejected petitioners' Commerce Clause challenge, holding that the Commonwealth's promulgation and enforcement of the Act fell within the "market participant" doctrine. *Id.* at 33a-34a (citing *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976)). The court concluded that

> public agencies applying the Act are no more than market participants in complying with the Act and specifying the use of domestically produced steel in public work projects.

Pet. App. 34a. The court noted that the state legislature, in the Act, did "not attempt to control or limit the free flow, or the sale, of foreign steel products in Pennsylvania." *Ibid.* Rather, the court determined, "[j]ust as with a private entity, the state may exercise a choice as to what it will purchase, but it does not thereby 'regulate' commerce in the constitutional sense." *Ibid.*

Turning to petitioners' claim regarding the Act's alleged interference with the federal government's exclusive authority over foreign affairs, the court concluded that the Act

> does not bring Pennsylvania into contact with a foreign government or with foreign affairs, and the only impact of the Act on other countries is incidental—i.e., a possible decrease in the total sales of foreign steel in Pennsylvania because public agencies will not buy it.

Pet. App. 35a. Since that "result * * * is traceable to participation in the marketplace and not to any

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[4] Petitioners' action, which had been filed in the Eastern District of Pennsylvania, was transferred to the Middle District of Pennsylvania in February 1989. Pet. App. 31a.

effort to control or regulate commerce with foreign countries," the court held that the Act did not intrude on the federal government's prerogatives in that area. *Ibid.*[5]

4. In October 1990, the court of appeals affirmed. Pet. App. 1a-29a. In the court of appeals, petitioners argued that "in controlling the purchases of * * * local [governmental] entities, the Commonwealth is regulating actors other than itself, thereby forfeiting market participant status" for purposes of the Commerce Clause. Pet. App. 16a-17a. In so contending, petitioners relied on *W.C.M. Window Co.* v. *Bernardi*,

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[5] The court of appeals similarly rejected petitioners' claim based on the state statute's alleged interference with the federal government's authority over foreign affairs. Pet. App. 23a-24a. Petitioners have abandoned that claim before this Court.

The district court also rejected petitioners' contentions that various provisions of federal law preempted the Pennsylvania Steel Products Procurement Act. Pet. App. 35a-36a (discussing the Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, United States-Canada, 27 I.L.M. 281, the Agreement on Government Procurement, General Agreement on Tariffs and Trade, art. II, Apr. 12, 1979, T.I.A.S. No. 10403, the Steel Import Stabilization Act, Pub. L. No. 98-573, Tit. VIII, §§ 801-808, 98 Stat. 3043-3047 (*reprinted at* note following 19 U.S.C. 2253), the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended in scattered sections of 5 U.S.C., 19 U.S.C., and 31 U.S.C.), and the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended principally in 19 U.S.C. 2501 *et seq.*)). Moreover, the court rejected petitioners' claim that the Act was unconstitutionally vague. Pet. App. 36a-38a.

The court of appeals upheld the district court's rejection of petitioners' federal preemption and vagueness claims, see Pet. App. 5a-14a, 24a-28a, and petitioners have not sought further review of them. Accordingly, those claims are also not before this Court.

730 F.2d 486, 495-496 (1984), where the Seventh Circuit held that for purposes of the market participant doctrine, local political subdivisions are not part of a State.

The court of appeals rejected petitioners' contention and expressly disagreed with the Seventh Circuit's decision in *W.C.M. Window*. Pet. App. 18a-20a. It found "no compelling analytical difference between a local government unit and central state agencies." *Id.* at 18a. In the court's view, "[b]oth exist only through affirmative acts of the state. A municipality derives its authority from the state." *Ibid.* The court pointed out that under Pennsylvania law, "it is clear that the local bodies covered by the [Steel Products Procurement Act] exist only by grace of state authority and with such powers as the state affirmatively provides." *Ibid.* The court therefore could "see no reason why, attendant on making such affirmative grants of power, the Commonwealth may not also restrict the contracting authority of such local bodies." *Ibid.* Since "[i]mposing such restrictions on central state agencies would be permitted [under the market participant doctrine]," the court did "not believe restrictions on local bodies stand in any different light." *Id.* at 18a-19a.

The court of appeals also determined that "the fact that the products being excluded are of foreign origin [did not] countenance[] a different result," Pet. App. 20a, concluding that "the Pennsylvania statute survives even the most searching review [under the Commerce Clause]," *id.* at 21a (citing *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U.S. 81 (1984); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979)). In its view, "state procurement policy fits comfortably within

[this] Court's observation that nothing in 'the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.' " Pet. App. 21a (quoting *Wardair Canada* v. *Florida Dep't of Revenue*, 477 U.S. 1, 13 (1985)). As the court pointed out, "Congress is aware of state activity * * * to restrict procurement of foreign goods, * * * and yet has not imposed a policy of national uniformity." Pet. App. 21a (footnote omitted).

Finally, the court of appeals found "no merit in [petitioners'] claim that the Steel Act violates the equal protection clause," Pet. App. 28a, noting that this case did "not involve the taxing power and 'the Equal Protection Clause permits economic regulation that distinguishes between groups that *are* legitimately different—as local institutions so often are,' " *id.* at 29a (quoting *Northeast Bancorp, Inc.* v. *Board of Governors*, 472 U.S. 159, 180 (1985) (O'Connor, J., concurring)).

DISCUSSION

The courts below correctly rejected petitioners' constitutional challenge to the Pennsylvania Steel Products Procurement Act. That challenge is without merit in light of established principles under the Commerce Clause and the Equal Protection Clause. As petitioners point out (Pet. 8-11), however, the court of appeals' application of the market participant doctrine—in one respect—conflicts with the Seventh Circuit's approach in *W.C.M. Window Co.* v. *Bernardi*, 730 F.2d 486 (1984). That limited conflict, in our view, does not now call for this Court's review, particularly given the dearth of reported case law in this area.

1. a. Petitioners contend that the breadth of the Pennsylvania Steel Products Procurement Act, which

extends to "the activities of local municipal authorities," Pet. 8, takes the state law outside the scope of the "market participant" exception to the Commerce Clause. See Pet. 8-11. This Court has held that "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 208 (1983); see, *e.g.*, *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 436-437 (1980) (upholding state law restricting sale of state-produced cement to state residents); *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) (upholding state "bounties" for scrap cars that favored state resident claimants). That doctrine stems from the fact that "[t]here is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc.* v. *Stake*, 447 U.S. at 437. Indeed, in light of " 'the long recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,' " *id.* at 438-439 (quoting *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919)), the Court has reasoned that "when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause," *Reeves, Inc.* v. *Stake*, 447 U.S. at 439.

States exercise sovereign powers through various levels of state, county, and local governmental entities. And as this Court has long recognized, "the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, [a local governmental entity] re-

mains the creature of the State exercising and holding powers and privileges subject to the sovereign will." *City of Trenton* v. *New Jersey*, 262 U.S. 182, 187 (1923). In view of this established governmental structure, the Court has recognized that, for purposes of applying various provisions of the Constitution, local governmental entities generally are to be treated as the States that created them. See, *e.g.*, *United Bldg. & Constr. Trades Council* v. *Mayor and Council of Camden*, 465 U.S. 208, 215 (1984) (Privileges and Immunities Clause); *Avery* v. *Midland County*, 390 U.S. 474, 480 (1968) (Fourteenth Amendment); cf. *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 111 S.Ct. 1344, 1348-1350 (1991) (municipality may claim State's Sherman Act immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943)).

For purposes of the Commerce Clause as well, the court of appeals recognized, there is "no compelling analytical difference between a local government unit and central state agencies." Pet. App. 18a. This reasoning is sound. Here, the Commonwealth of Pennsylvania, acting through various governmental entities created by and subject to state law, see Pa. Stat. Ann. tit. 73, § 1886 (Purdon Supp. 1990), has exercised its prerogative in the marketplace to limit its purchases of foreign steel products. Under Pennsylvania law, as the court of appeals pointed out, "the local bodies covered by [the Steel Products Procurement Act] exist only by grace of state authority and with such powers as the state affirmatively provides." Pet. App. 18a; see *id.* at 18a n.15 (collecting cases). Indeed, municipal authorities are "independent agencies of the Commonwealth, and part of its sovereignty." *Commonwealth* v. *Erie Metro. Transit Auth.*, 444 Pa. 345, 348, 281 A.2d 882, 884 (1971).

Accordingly, the court of appeals correctly held that the Commonwealth has not forfeited its "market participant" status under the Commerce Clause by restricting the contracting authority of local governmental entities in the Steel Products Procurement Act.

b. As petitioners point out (Pet. 8-11), the court of appeals' application of the market participant doctrine conflicts—in one respect—with the Seventh Circuit's approach in *W.C.M. Window Co.* v. *Bernardi*, 730 F.2d 486 (1984). There, the court of appeals concluded that, for purposes of the Commerce Clause, "[w]hen the project on which the state impresses a home-state preference is undertaken by a unit of local government without any state financial support or supervision, the state is not a participant in the project but a regulator." *Id.* at 496. In so holding, the Seventh Circuit reasoned:

> [S]ince more public contracting in the states is done at the local level, by cities, school districts, park districts, counties, etc., than at the state level, extending [the market participant doctrine] to cases where the state's relationship to its local agencies is purely regulatory could do great damage to the principles of free trade on which the negative commerce clause is based.

Ibid.

For the reasons stated above, the Seventh Circuit's analysis in *W.C.M. Window* is mistaken. As the court below acknowledged, "[i]t may be true that local municipalities and authorities are responsible for the great bulk of sub-national public procurement." Pet. App. 19a. Nevertheless, there is "no suggestion in [this] Court's previous forays into this area that the quantum of market purchases should

affect a public entity's qualification for market participant status." *Ibid.*[6]

In our view, the conflict between the *W.C.M. Window* and the decision below does not now call for resolution by this Court. First, the sharpness of the conflict is tempered by the alternative holding in *W.C.M. Window*, namely, that the Illinois statute at issue violated the Privileges and Immunities Clause of Article IV. See 730 F.2d at 496-498. Second, in *W.C.M. Window*, the court of appeals expressly recognized that "if the State of Illinois had limited the preference law to construction projects financed (in whole or part) or administered by the state, it would be clear * * * that the law did not violate the commerce clause." 730 F.2d at 495. Here, the record is silent as to whether the sort of local public works projects at issue are either funded or administered in part by the Commonwealth. Nonetheless, in view of applicable state law, see, *e.g.*, the Pennsylvania Solid Waste-Resource Recovery Development Act, Pa. Stat. Ann. tit. 35, §§ 755.1 *et seq.*

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[6] Moreover, *W.C.M. Window* appears to be in tension with this Court's decision in *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983) (upholding city order requiring construction projects funded by city funds to be performed by work force consisting of 50% city residents). As the court below noted:

> If employees of a private contractor can be thought to be in relationship with the city, we think it equally clear that suppliers of a local public entity can be thought to be "supplying for the state." As the ultimately controlling public purchaser, the Commonwealth enjoys the same right to specify to its suppliers the source of steel to be used in any supplies provided as is enjoyed by similarly situated private purchasers.

Pet. App. 19a.

(Purdon 1977); the Pennsylvania Infrastructure Investment Authority Act, Pa. Stat. Ann. tit. 35, §§ 751.1 *et seq.* (Purdon Supp. 1990), such state participation is not unlikely. If such were the case, the limited conflict between the decision below and *W.C.M. Window* would be immaterial.[7]

Third, application of the market participant doctrine to local governmental entities has not been a widely litigated issue. Petitioners can point to only the decision below and *W.C.M. Window* as reaching the issue, and we are aware of no other recently reported federal or state decisions resolving, much less addressing, the matter. Cf. *K.S.B. Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 293-299, 381 A.2d 774, 784-787 (1977) (upholding state "buy American" statute against Commerce Clause challenge). Finally, despite the fact that a number of States have enacted "buy-American" legislation in recent years,[8] and thus may be targets of Commerce Clause challenges, such legislation has also been the infrequent subject of reported litigation.

2. Petitioners next contend that this case presents an issue the Court reserved in *Reeves, Inc.* v. *Stake*, 447 U.S. at 438 n.9, and did not resolve definitively in *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 93-99 (1984) (plurality opinion); *id.* at 101 (Brennan, J., concurring), namely, "whether state

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[7] It is also noteworthy that the state law at issue in *W.C.M. Window* restricted *employment* on covered projects to *state* residents, while the law at issue in this case restricts use of *materials* to those produced in the *United States*.

[8] See Pet. App. 21a n.17; R. Zee, *Purchasing Preference Practices: A 50 State Overview* 22-24 (The Council of State Governments, 1989).

buy-American legislation is safeguarded from commerce clause scrutiny by the market participant doctrine," Pet. 12. In particular, petitioners take the position that such state laws are subject to so-called "heightened foreign commerce clause scrutiny," *ibid.*, a question that this Court has also not definitively resolved, see *Reeves, Inc.* v. *Stake*, 447 U.S. at 438 n.9; *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. at 99-101 (plurality opinion); *id.* at 101 (Brennan, J., concurring).

In our view, this case is not a suitable vehicle for addressing the questions petitioners pose. Here, the court of appeals expressly held that "the Pennsylvania statute survives even the most searching review [under the Commerce Clause]." Pet. App. 21a. That conclusion is unexceptionable on the record presented, since the court of appeals thoroughly canvassed pertinent authoritative federal law and Executive Branch activities in determining that "[s]tate procurement practices present no problems of reconciling conflicting polic[ies] among multiple national sovereigns." *Ibid.*; see *id.* at 7a-14a.

Indeed, in the context of the Uruguay Round of international trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), the United States and other nations are currently discussing extending the Agreement on Government Procurement, GATT, art. II, Apr. 12, 1979, T.I.A.S. No. 10403, to local, state, and regional governmental entities.[9] To date, a number of our

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[9] As the court of appeals pointed out, "the Government Procurement Agreement only purports to cover fifty-four *federal agencies*." Pet. App. 10a-11a; see also *Statement of Administrative Action*, H.R. Doc. No. 153, 96th Cong., 1st Sess. Pt. 2, at 479 (1979) ("Purchases by state and local governments are not covered since the Agreement applies only to federal agencies specifically listed.").

trading partners have offered to lower trade barriers at every level of government procurement if the United States reciprocates; those offers are being considered by the appropriate authorities in the Executive Branch. In this fluid state of affairs, the existence and enforcement of "buy-American" laws such as the Pennsylvania Steel Products Procurement Act (and their foreign counterparts)—not uncommon features on domestic and foreign legal landscapes—do not interfere with ongoing trade negotiations or hamper the federal government's conduct of foreign trade policy. Of course, if an international agreement removing such trade barriers were reached, the agreement, once adopted as federal law, would override any conflicting state laws or regulations. See *United States* v. *Belmont*, 301 U.S. 324 (1937); *Missouri* v. *Holland*, 252 U.S. 416 (1920).

3. Finally, petitioners contend (Pet. 18-22) that the Pennsylvania Steel Products Procurement Act, as a "blatant attempt[] at economic protectionism," (Pet. 18) violates the Equal Protection Clause. That claim is insubstantial. Here, the Commonwealth's distinction between domestic and foreign steel products is rationally related to a legitimate governmental purpose, namely, to encourage support for a vital but financial strapped industry that accounts for substantial local employment and tax revenue. See Pa. Stat. Ann. tit. 73, § 1883 (Purdon Supp. 1990); cf. *American Yearbook Co.* v. *Askew*, 339 F. Supp. 719, 723 (M.D. Fla.), aff'd, 409 U.S. 904 (1972) (upholding State's practice of favoring in-state publishing houses in buying school textbooks against challenge under the Equal Protection Clause).

For that reason, this case is unlike *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985), where

the Court struck down the state taxing measure at issue after determining that "Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there." *Id.* at 878. Indeed, the Commonwealth in this case has not at all outlawed the sale of foreign steel products within its borders. To the contrary, the Commonwealth has only excepted state and local governmental entities from the pool of available purchasers of such products.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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